



## McGeorge Law Review

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Volume 12 | Issue 2

Article 10

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1-1-1980

### Business Associations and Professions

University of the Pacific; McGeorge School of Law

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#### Recommended Citation

University of the Pacific; McGeorge School of Law, *Business Associations and Professions*, 12 PAC. L. J. (1981).

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# Business Associations and Professions

## Business Associations and Professions; nonprofit religious corporations

Corporations Code §9230 (new and repealed); §§9142, 9690 (amended).

SB 1493 (Petrus); STATS 1980, Ch 1324

(*Operative June 1, 1981*)

Support: Office of Planning and Research

Opposition: Attorney General of California; Office of the Governor, Legal Affairs Unit

Prior to the enactment of Chapter 1324, the Attorney General was authorized to examine a religious corporation when there were reasonable grounds to believe that the corporation was engaged in certain wrongful activities.<sup>1</sup> Moreover, the Attorney General could institute an action in the name of the state to correct the wrongful activity of a religious corporation, or could seek an order establishing that the corporation failed to qualify as a religious corporation.<sup>2</sup> Chapter 1324 repeals these provisions<sup>3</sup> and instead severely restricts the powers of the Attorney General to examine the affairs of religious corporations.<sup>4</sup> In doing so, the legislature intends to limit the power of the state with respect to the formation, existence, and operation of religious corporations to those powers *expressly* provided by statute.<sup>5</sup> In addition, Chapter 1324 states that mere incorporation under the laws of California does not constitute a waiver of the fundamental protections granted to religious organizations.<sup>6</sup>

Specifically, the Attorney General is empowered to initiate criminal procedures to prosecute religious corporations for violations of the criminal laws<sup>7</sup> and, upon conviction, to seek restitution as punishment.<sup>8</sup>

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1. See CAL. STATS. 1979, c. 681, §1, at — (amending CAL. CORP. CODE §9230). See generally 11 PAC. L.J., REVIEW OF SELECTED 1979 CALIFORNIA LEGISLATION 311 (1980) (nonprofit corporation law-religious corporations); 10 PAC. L.J., REVIEW OF SELECTED 1978 CALIFORNIA LEGISLATION 282 (1979) (nonprofit corporation law).

2. See CAL. STATS. 1979, c. 681, §1, at —.

3. See CAL. STATS. 1980, c. 1324, §3, at — (repealing CAL. CORP. CODE §9230).

4. Compare CAL. CORP. CODE §9230 with CAL. STATS. 1979, c. 681, §1, at —.

5. See CAL. STATS. 1980, c. 1324, §1, at —.

6. See *id.*

7. See CAL. CORP. CODE §9230(c)(2).

8. See *id.*

In addition, the Attorney General may still bring an action in the name of the people to obtain a judicial determination of whether a corporation is properly classified as a religious corporation,<sup>9</sup> and may enforce a charitable trust<sup>10</sup> subject to certain requirements.<sup>11</sup> Also, the Attorney General is authorized to represent as legal counsel any agency or department of the state expressly empowered to act with respect to the status, or regulate the activities, of religious corporations.<sup>12</sup> Furthermore, the Attorney General has authority, as expressly provided, with respect to corporate filing,<sup>13</sup> corporate dissolution,<sup>14</sup> or corporate crimes.<sup>15</sup> Under Chapter 1324, however, except as authorized by California criminal law<sup>16</sup> or as specifically enumerated by this Chapter,<sup>17</sup> the Attorney General may no longer, upon reasonable grounds, examine a religious corporation to determine (1) if that corporation has engaged in fraudulent activity,<sup>18</sup> (2) whether corporate property has been diverted for the personal benefit of any person,<sup>19</sup> or (3) whether there has been a substantial diversion of corporate assets from stated corporate purposes.<sup>20</sup>

In addition to limiting the power of the Attorney General with respect to religious corporations,<sup>21</sup> Chapter 1324 expands the group of people who may obtain a remedy for breach of a trust under which any of the assets of a religious corporation are held.<sup>22</sup> Prior law provided that only the corporation, an officer or director of the corporation, or a person with a reversionary, contractual, or property interest in the assets subject to the trust could institute an action to remedy a breach of trust.<sup>23</sup> Chapter 1324 adds that a member or a former member, asserting the right in the name of the corporation, may now bring the cause of action so long as the provisions governing members' derivative ac-

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9. *See id.* §9230(b). *See generally* CAL. CIV. PROC. CODE §803.

10. *See* CAL. CORP. CODE §9230(d).

11. *See id.* §9230(d)(1), (2). The Attorney General must notify the corporation prior to bringing an action so that the corporation may take immediate steps to correct an improper diversion of funds. Also, if impractical or impossible to devote property to the specified charitable purpose, the directors may approve in good faith the use of that property for general purposes of the corporation.

12. *See id.* §9230(c)(3).

13. *See id.* §9230(c)(1). *See generally id.* §§6210-6216, 9660.

14. *See id.* §9230(c)(1). *See generally id.* §9680(a), (c).

15. *See id.* §9230(c)(1). *See generally id.* §§6810-6815, 9690.

16. *See id.* §9230(a).

17. *See id.* §9230.

18. *Compare id.* §9230 with CAL. STATS. 1979, c. 681, §1, at —.

19. *See* note 18 *supra*.

20. *See* note 18 *supra*.

21. *Compare* CAL. CORP. CODE §9230 with CAL. STATS. 1979, c. 681, §1, at —.

22. *Compare* CAL. CORP. CODE §9142(a)(1) with CAL. STATS. 1979, c. 724, §133.5, at — (amending CAL. CORP. CODE §9142).

23. *See* CAL. STATS. 1979, c. 724, §133.5, at —.

tions are complied with.<sup>24</sup> Moreover, Chapter 1324 expressly provides legislative encouragement to the courts to sentence persons convicted of fraudulent activities and to impose restitution to compensate the victims of the fraudulent activity.<sup>25</sup>

### *COMMENT*

Chapter 1324 apparently puts California's nonprofit religious corporation law on firmer constitutional grounds<sup>26</sup> and reflects the concern of the United States Supreme Court in avoiding extensive state investigation into church affairs and finance,<sup>27</sup> and entanglement of "government in difficult classifications of what is or is not religious."<sup>28</sup> As a result of the passage of Chapter 1324, however, the Attorney General of California dropped several suits against religious organizations, including a suit against Synanon to block that organization from allegedly diverting funds from charity solicitations into nonchurch purposes, and a similar suit against the World Wide Church of God to recover funds that were allegedly misused by leaders of that organization.<sup>29</sup>

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24. Compare CAL. CORP. CODE §9142(a)(1) with CAL. STATS. 1979, c. 724, §133.5, at —. See generally CAL. CORP. CODE §5710.

25. See CAL. CORP. CODE §9690.

26. Cf. Hone, *California's New Nonprofit Corporation Law—An Introduction and Conceptual Background*, 13 U.S.F.L. REV. 733, 744 (1979) (the less restrictive provisions of CAL. CORP. CODE §9230 as amended in 1979, "should withstand any constitutional challenge"). Compare CAL. CORP. CODE §9230 with CAL. STATS. 1979, c. 681, §1, at — and CAL. STATS. 1978, c. 567, §7, at 1905.

27. See *Walz v. Tax Commission*, 397 U.S. 664, 691 (Brennan, J., concurring); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 869 (1978).

28. 397 U.S. at 698 (Harlan, J., concurring); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 869 (1978).

29. See *Sacramento Bee*, October 15, 1980, at A18, col. 1.

## **Business Associations and Professions; franchises**

Business and Professions Code §§20000-20043 (new); Corporations Code §§31101, 31119, 31125 (amended).

AB 295 (Young); STATS 1980, Ch 1355

Support: Department of Economic Business and Development; International Franchise Association

Opposition: California Franchise Council

*Enacts the California Franchise Relations Act regulating the termination and nonrenewal of franchises; provides for relocation of franchised businesses in regional shopping centers; changes the time period from 48 hours to ten business days within which a franchisor may qualify for*

*an exemption to the disclosure requirements of the Franchise Investment Law.*

Chapter 1355 enacts the California Franchise Relations Act<sup>1</sup> which, unlike the Franchise Investment Law,<sup>2</sup> regulates the *termination*<sup>3</sup> and *nonrenewal*<sup>4</sup> of all franchises granted or renewed on or after January 1, 1981.<sup>5</sup> The Act applies only to franchises when either the franchisee is domiciled in California or the franchised business is or has been operated in the state.<sup>6</sup>

### *Definitions*

Using the same definitions as the Franchise Investment Law,<sup>7</sup> Chapter 1355 defines "franchise" as a contract or agreement, either express or implied, oral or written, by which (1) the franchisee<sup>8</sup> is granted a right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system provided by the franchisor,<sup>9</sup> (2) the operation of the franchisee's business under the marketing plan is substantially associated with the franchisor's trademark, commercial symbol, logotype or advertising,<sup>10</sup> and (3) the franchisee is required to pay a franchise fee.<sup>11</sup> Chapter 1355 provides, however, that a franchise does not include a petroleum franchise regulated by the federal government<sup>12</sup> or an automobile franchise governed by the Vehicle Code.<sup>13</sup> Furthermore, a franchise does not include lease departments, licenses, or concessions at or with a general retail establishment when the sales of the lease department, licensee, or concessionaire amount to less than ten percent of the retail establishment's total sales.<sup>14</sup>

Before a business may be considered a franchise under Chapter 1355,

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1. See CAL. BUS. & PROF. CODE §20000.

2. See CAL. CORP. CODE §§31001-31516 (modified disclosure statute regulating the sale of franchises). See generally Damon, *Franchise Investment Law*, 2 PAC. L.J. 27 (1971); Siegel, *Current Efforts in Consumer Protection In the Business-Investment Area*, 8 SAN DIEGO L. REV. 62, 69-74 (1971).

3. See CAL. BUS. & PROF. CODE §20020.

4. See *id.* §20025.

5. See *id.* §20041.

6. *Id.* §20015.

7. See *id.* §20009; CAL. CORP. CODE §31005.

8. See generally CAL. BUS. & PROF. CODE §20002 (definition of franchisee).

9. See *id.* §20001(a). See generally *id.* §20003 (definition of franchisor).

10. See *id.* §20001(b).

11. See *id.* §20001(c).

12. See *id.* §20001(d). See generally Petroleum Marketing Practices Act, Pub. L. No. 95-297, 92 Stat. 322 (1978).

13. See CAL. BUS. & PROF. CODE §20042. See generally CAL. VEH. CODE §§3060-3069 (regulating automobile franchises).

14. See CAL. BUS. & PROF. CODE §20001(e).

the franchisee must pay a *franchise fee*<sup>15</sup> defined as any fee or charge required or agreed to be paid for the right to enter a business under a franchise agreement, including, but not limited to, any payment for goods and services.<sup>16</sup> The following, however, are not considered franchise fees: (1) the purchase or agreement to purchase goods at a bona fide wholesale price if there is no obligation on the purchaser to purchase or pay for a quantity in excess of that which a *reasonable businessman* normally would purchase as a starting inventory or to maintain a going inventory;<sup>17</sup> (2) the payment of a reasonable service charge to the issuer of a credit card by an establishment honoring the card;<sup>18</sup> (3) amounts paid by a retailer to a licensed trading stamp company;<sup>19</sup> (4) the payment of a fee that does not exceed \$100 on an annual basis;<sup>20</sup> and, (5) the payment of an amount not exceeding \$1,000 for the purchase price or rental of fixtures, equipment, or other tangible property to be utilized for the necessary operation of the business if the purchase price or rental payment does not exceed the cost for the same property on the open market.<sup>21</sup>

### *Termination and Nonrenewal*

Under prior law, there were no provisions regulating the termination of franchises except in the areas of petroleum marketing<sup>22</sup> and automobile dealerships.<sup>23</sup> Once a business is determined to be a franchise under Chapter 1355, however, a franchisor may not terminate the franchise prior to its expiration except for *good cause*.<sup>24</sup> For the purposes of Chapter 1355, good cause includes, but is not limited to, the failure of the franchisee to comply with the requirements of the franchise agreement after being given a reasonable opportunity to cure the failure.<sup>25</sup> Chapter 1355 does provide, however, that it is reasonable for a franchisor to terminate immediately without an opportunity for the franchisee to cure<sup>26</sup> if, for example, the franchisee is declared bankrupt,<sup>27</sup> insolvent,<sup>28</sup> or abandons the business for five consecutive days.<sup>29</sup>

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15. See *id.* §§20001(c), 20007.

16. See *id.* §20007.

17. See *id.* §20007(a).

18. See *id.* §20007(b).

19. See *id.* §20007(c). See generally *id.* §17750.

20. See *id.* §20007(d).

21. See *id.* §20007(e).

22. See Petroleum Marketing Practices Act, Pub. L. No. 95-297, 92 Stat. 322 (1978).

23. See CAL. VEH. CODE §§3060-3069.

24. See CAL. BUS. & PROF. CODE §20020.

25. See *id.* (in no event need the opportunity to cure be for more than 30 days).

26. See *id.* §20021.

27. See *id.* §20021(a).

28. See *id.*

In addition to the prohibition against terminating without good cause,<sup>30</sup> Chapter 1355 states that a franchisor must provide written notice of his or her intention not to renew a franchise at least 180 days prior to the expiration of the franchise.<sup>31</sup> Before renewal may be refused, however, Chapter 1355 requires that notice must be given to the franchisee<sup>32</sup> and at least one of the following must occur: (1) the franchisor must allow the franchisee to sell his or her business to a purchaser meeting the franchisor's current requirements during the 180 days prior to the expiration of the franchise;<sup>33</sup> (2) the refusal to renew is not for the purpose of converting the franchisee's business premises for the franchisor's own account,<sup>34</sup> and the franchisor agrees not to enforce any covenant of the franchisee not to compete;<sup>35</sup> (3) termination by the franchisor would otherwise be permitted under the provisions of the Act;<sup>36</sup> (4) both the franchisee and franchisor agree not to renew;<sup>37</sup> (5) the franchisor withdraws from distributing its products or services through franchises in the geographic market<sup>38</sup> and other related conditions are satisfied;<sup>39</sup> or (6) the franchisor and franchisee fail to agree to changes or additions to the franchise agreement, provided the changes or additions would result in renewal of the franchise agreement on substantially the same terms as the franchisor customarily grants renewal franchises.<sup>40</sup> If the franchisor and franchisee fail to agree on the changes or additions to the franchise agreement, the franchisor may give 30 days written notice of a date on which the changes or additions must be accepted in writing.<sup>41</sup> If this notice is given at least 180 days prior to the expiration of the franchise term, then it may contain a provision stating that in the event no agreement is reached, the 30-day

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29. *See id.* §20021(b). For further examples, *see, e.g., id.* §20021(c) (agreement to terminate immediately), (d) (material misrepresentations and unfavorable conduct), (e) (noncompliance with federal, state, or local law), (f), (g) (repeated noncompliance with franchise agreement), (h) (franchised business is seized by government official or lien creditor), (i) (conviction of felony or similar criminal conduct), (j) (failure to pay franchise fee), (k) (continued operation will result in public danger).

30. *See id.* §20020.

31. *See id.* §20025.

32. *See id.* §§20025, 20030. *See also* text accompanying notes 44-49 *infra*.

33. *See* CAL. BUS. & PROF. CODE §20025(a).

34. *See id.* §20025(b)(1) (no prohibition against a franchisor exercising a right of first refusal to purchase the franchisee's business).

35. *See id.* §20025(b)(2).

36. *See id.* §20025(c). *See generally id.* §§20020, 20021.

37. *See id.* §20025(d).

38. *See id.* §20025(e).

39. *See, e.g., id.* §20025(e)(1) (unable to enforce covenants not to compete), (e)(2) (not for the purpose of converting business to franchisor's own account), (e)(3)(A) (30 day right of first refusal to purchase franchisor's interest if for sale), (e)(3)(B) (third person purchaser must offer the franchisee a franchise agreement).

40. *See id.* §20025(f).

41. *See id.*

notice will be deemed a notice of intention not to renew.<sup>42</sup> Furthermore, nothing in Chapter 1355 prohibits the franchisor from offering to extend the franchise term for a limited period of time to satisfy the notice requirements for nonrenewal.<sup>43</sup>

### *Notices And Arbitration*

All notices of termination or nonrenewal that are required to be given by Chapter 1355 must be in writing<sup>44</sup> and must be delivered by registered, certified, or other receipted mail, or by telegram or personal service on the franchisee.<sup>45</sup> Furthermore, the notice must contain a statement of intent to terminate or not renew, together with the reasons therefor and the effective date of the termination or nonrenewal.<sup>46</sup> In addition, Chapter 1355 provides that the franchisor and franchisee may agree before or after a dispute has arisen to submit to binding arbitration,<sup>47</sup> provided, however, that the standards applied during arbitration are not less than the standards contained in Chapter 1355.<sup>48</sup> Arbitrators must be chosen from a list of impartial arbitrators.<sup>49</sup>

### *Offers to Repurchase Inventory*

Chapter 1355 further requires that, in the event of a termination or nonrenewal of a franchise other than in accordance with the provisions of the Chapter, the franchisor must offer to repurchase the franchisee's resalable current inventory meeting the franchisor's present standards at the fair wholesale market value or at the price paid by the franchisee, whichever is less.<sup>50</sup> The franchisor is only obligated to repurchase the inventory that is required by the franchise agreement or commercial practice *and* that is held for use or sale in the franchised business.<sup>51</sup> The franchisor, however, may offset against the repurchase price any amounts owing under the franchise agreement,<sup>52</sup> and is not obligated to purchase personalized items having no value to the franchisor's business.<sup>53</sup> Also, the repurchase of the inventory under Chapter 1355 will not abrogate any rights of the franchisee to sue the franchisor on any

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42. *See id.* §§20025, 20025(f).

43. *See id.* §20026.

44. *See id.* §20030(a).

45. *See id.* §20030(b).

46. *See id.* §20030(c).

47. *See id.* §20040.

48. *See id.* §20040(a).

49. *See id.* §20040(b).

50. *See id.* §20035.

51. *See id.*

52. *See id.* §20036.

53. *See id.* §20035.



claim.<sup>54</sup>

### *Miscellaneous*

In addition to the regulatory provisions of the California Franchise Relations Act, Chapter 1355 also provides that franchises located within a regional shopping center<sup>55</sup> in a city with a population of *under* 60,000 and in a county of the first class<sup>56</sup> may relocate within the same shopping center with the consent of either the franchisee and the management of the shopping center or the franchisor and the management of the shopping center.<sup>57</sup> This provision of Chapter 1355 relating to the relocation of franchises is an urgency statute and is effective immediately.<sup>58</sup>

Furthermore, existing law provides that it is unlawful to offer or sell any franchise without first registering with the Commissioner of Corporations<sup>59</sup> and disclosing extensive information concerning the financial stability of the franchise.<sup>60</sup> Under prior law, a franchisor was exempted from these registration and disclosure requirements if, among other things, he or she provided the prospective franchisee with certain information concerning the nature and financial stability of the franchise,<sup>61</sup> a copy of a prospectus of the franchise,<sup>62</sup> or a copy of the proposed modification to an existing agreement at least 48 hours prior to the execution of any franchise agreement or modification.<sup>63</sup> Chapter 1355 extends this minimum time period from 48 hours to ten business days.<sup>64</sup>

### *Conclusion*

Chapter 1355 enacts the California Franchise Relations Act<sup>65</sup> that governs the termination<sup>66</sup> and nonrenewal<sup>67</sup> of franchises within the state.<sup>68</sup> By requiring a minimum of 180 days prior written notice of

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54. *See id.* §20037.

55. Although Chapter 1355 does not specifically define "regional," an analogous definition may be found in Government Code Section 65060.6 (definition of region as the area included within a planning district).

56. *See* CAL. GOV'T CODE §28022 (definition of first class county).

57. *See* CAL. STATS. 1980, c. 1355, §5, at —.

58. *See id.* §7, at —.

59. *See* CAL. CORP. CODE §§31110, 31111.

60. *See id.* §31111.

61. *See* CAL. STATS. 1970, c. 1400, §3, at 2647 (enacting CAL. CORP. CODE §31101).

62. *See* CAL. STATS. 1970, c. 1400, §3, at 2653 (enacting CAL. CORP. CODE §31119).

63. *See* CAL. STATS. 1977, c. 762, §13, at 2383 (enacting CAL. CORP. CODE §31125).

64. *See* CAL. CORP. CODE §§31101(c), 31119, 31125(b).

65. *See* CAL. BUS. & PROF. CODE §20000.

66. *See id.* §20020.

67. *See id.* §20025.

68. *See id.* §§20000-20043.

intent not to renew<sup>69</sup> and by prohibiting termination without good cause,<sup>70</sup> Chapter 1355 apparently follows in the footsteps of other protective measures written to prevent unfair practices, fraud, and misrepresentation,<sup>71</sup> and to promote continuity in franchisee-franchisor contractual relationships.<sup>72</sup>

### *COMMENT*

The provision of Chapter 1355 relating to the relocation of franchises within regional shopping centers<sup>73</sup> may be subject to constitutional challenge in that the provision makes an impermissible legislative classification.<sup>74</sup> Article IV, section 16 of the California Constitution states that all laws of a general nature have uniform application and that a local or special law is invalid in any case if a general statute can be made applicable.<sup>75</sup> This constitutional provision is interpreted to be substantially equivalent to the equal protection clause of the fourteenth amendment to the United States Constitution and to evoke the same standards.<sup>76</sup> Therefore, any classification made by the legislature on the basis of population must bear a reasonable relation to the purpose of the statute.<sup>77</sup> In addition, any legislative classification must be shown to be based on some natural, intrinsic, or constitutional distinction in order to be valid.<sup>78</sup>

Chapter 1355 creates a privilege for franchises located within regional shopping centers in cities with a population of *less* than 60,000 *and* in counties of the first class.<sup>79</sup> For the purpose of regulating the compensation of county officers,<sup>80</sup> the legislature has classified the several counties into 57 classes according to population.<sup>81</sup> Los Angeles County is the only county of the first class within the state.<sup>82</sup> Therefore, the privileges created by Chapter 1355 apply only to those

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69. *See id.* §20025.

70. *See id.* §20020.

71. *See* CAL. CORP. CODE §31001 (definition of legislative intent of the Franchise Investment Law).

72. *See* CAL. STATS. 1980, c. 1355, §7, at —.

73. *See id.* §5, at —.

74. *See* CAL. CONST. art. IV, §16; CAL. STATS. 1980, c. 1355, §5, at —.

75. *See* CAL. CONST. art. IV, §16.

76. *See* *Durham v. City of Los Angeles*, 91 Cal. App. 3d 567, 575, 154 Cal. Rptr. 243, 247 (1979).

77. *See* *Board of Education v. Watson*, 63 Cal. 2d 829, 833, 409 P.2d 481, 484, 48 Cal. Rptr. 481, 484 (1966).

78. *See* *Krause v. Durbrow*, 127 Cal. 681, 684-85, 60 P. 438, 439 (1900); *City of Pasadena v. Stimson*, 91 Cal. 238, 251-52, 27 P. 604, 607 (1891). *See generally* *Alameda County Flood Control & Water Conservation Dist. v. Stanley*, 121 Cal. App. 2d 308, 314-15, 263 P.2d 632, 636 (1953).

79. *See* CAL. STATS. 1980, c. 1355, §5, at —.

80. *See* CAL. GOV'T CODE §28021.

81. *See id.* §§28022-28078.

82. *See id.* §§28020, 28022.

franchises located in cities *under* 60,000 in population within the County of Los Angeles.<sup>83</sup> The stated legislative purpose for this classification is to provide for continuity in franchisee-franchisor contractual relationships.<sup>84</sup> Arguably, there is no natural, intrinsic, or constitutional distinction between franchises provided for by Chapter 1355 and similarly situated franchises in cities with a population *over* 60,000 in Los Angeles County or in *any* other city located in *any* other county.<sup>85</sup> Moreover, the legislative classification of counties itself appears to be suspect because the constitutional provision authorizing the classification has been deleted from the constitution.<sup>86</sup> Unless the legislature can show a reasonable relationship between franchises located in small cities within large counties and the declared purpose of the statute, Chapter 1355 may be subject to constitutional challenge as a special law imposing a legislative classification not based on any natural, intrinsic, or constitutional distinction.<sup>87</sup>

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83. Compare *id.* with CAL. STATS. 1980, c. 1355, §5, at —.

84. See CAL. STATS. 1980, c. 1355, §5, at —.

85. See generally *City of Pasadena v. Stimson*, 91 Cal. 238, 251-52, 27 P. 604, 607 (1891).

86. Compare CAL. CONST. art. XI, §5 (1849) with CAL. CONST. art. XI, §§1, 10.

87. See *Board of Education v. Watson*, 63 Cal. 2d 829, 833, 409 P.2d 481, 484, 48 Cal. Rptr. 481, 484 (1966); 91 Cal. at 251-52, 27 P. at 604-07.

### **Business Associations and Professions; contracts—irrevocable offers, time period for breach of warranty**

Business and Professions Code §§5681, 7091, 9580, 9582, 9583 (amended); Commercial Code §2205 (amended).

AB 1635 (Mountjoy); STATS 1980, Ch 537

Support: Office of the Governor, Legal Affairs Unit

AB 3196 (Thurman); STATS 1980, Ch 1210

Support: Department of Consumer Affairs

Under prior law, an offer was irrevocable despite a lack of consideration *only* if it was in writing and by its terms gave assurance that it would be held open.<sup>1</sup> In *Drennan v. Star Paving Company*,<sup>2</sup> the California Supreme Court held irrevocable an offer unsupported by consideration that had been presented by the offeror with the knowledge that the offeree was intending to rely on the offer in making his or her own bid.<sup>3</sup> The *Drennan* principle appears, however, to apply only to oral

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1. See CAL. STATS. 1963, c. 819, §1, at 1861 (enacting CAL. COM. CODE §2205).

2. 51 Cal. 2d 409, 333 P.2d 757 (1958).

3. See *id.* at 413-15, 333 P.2d at 759-60.

bids involving both *work and materials*.<sup>4</sup> Oral offers for *goods only* fall outside the scope of *Drennan*.<sup>5</sup> Chapter 537 apparently expands the *Drennan* principle to include verbal offers by merchants<sup>6</sup> to supply goods to licensed contractors.<sup>7</sup>

If a merchant renders an offer, written *or* oral, to supply goods to a licensed contractor, and the merchant has actual or implied knowledge that the contractor is licensed and will rely on the offer in the submission of a bid for a construction contract to a third party, the offer is irrevocable for a period of ten days after the awarding of the contract to the contractor.<sup>8</sup> Exception is provided if the offer is oral and for a price of \$2,500 or more, in which case the bid or offer must be confirmed in writing by the contractor or his or her agent within 48 hours after it is rendered by the merchant.<sup>9</sup> Failure of the contractor to confirm the offer in writing will release the merchant from his or her offer.<sup>10</sup>

Chapter 537 also provides that in no event will the offer be held open for more than 90 days after it is rendered by the merchant.<sup>11</sup> The merchant may provide, however, that the offer will be held open for a period of time less than that provided by Chapter 537.<sup>12</sup> By allowing the merchant to limit the duration of his or her offer, Chapter 537 appears to protect the merchant in those situations when a long period of time elapses between the merchant's bid and the awarding of the contract to the contractor by a third party.<sup>13</sup>

Under prior law, most accusations<sup>14</sup> against a contractor had to be filed within three years after the alleged breach.<sup>15</sup> Chapter 1210 provides an exception for accusations regarding an alleged breach of an express written warranty for a period *in excess of three years*; these accusations must be filed within the duration of the warranty period.<sup>16</sup>

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4. See *id.* at 412, 333 P.2d at 758; *cf.* C.R. Fedrick, Inc. v. Borg-Warner Corp., 552 F.2d 852, 856-57 (9th Cir. 1977).

5. See 552 F.2d at 856-58. But see *id.* at 859 n.3 (Wallace, C.J., dissenting).

6. See CAL. COM. CODE §2104(1) (definition of merchant).

7. Compare *id.* §2205 with 51 Cal. 2d at 413-15, 333 P.2d at 759-60. See generally CAL. BUS. & PROF. CODE §§7055-7059 (classifications of contractors), 7065-7077 (licensing requirements for contractors); CAL. COM. CODE §§2105(1), (2) (definition of contract), 2106(1) (definition of goods).

8. See CAL. COM. CODE §2205(b).

9. See *id.*

10. See *id.*

11. See *id.*

12. See *id.*

13. See *id.*

14. See CAL. GOV'T CODE §§11500-11507 (procedure for initiating administrative adjudication).

15. See CAL. STATS. 1963, c. 1258, §1, at 2779 (amending CAL. BUS. & PROF. CODE §7091). See generally CAL. BUS. & PROF. CODE §7112 (accusation of misrepresentation in obtaining license may be filed within two years).

16. See CAL. BUS. & PROF. CODE §7091.

This change, however, does not affect the liability of a surety or the period of limitations prescribed by law for the commencement of an action against a surety or a cash deposit.<sup>17</sup>

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17. *See id.*

## **Business Associations and Professions; prepaid rental listing services**

Business and Professions Code §10143 (repealed); §§10167-10167.16 (new).

SB 1564 (Watson); STATS 1980, Ch 1051

(*Effective September 25, 1980*)

Support: Department of Finance; Department of Real Estate

A prepaid rental listing service is a business that supplies prospective tenants with listings of residential real property available for tenancy.<sup>1</sup> The service, however, does not include the negotiation of rentals by the person conducting the business.<sup>2</sup> Prior to the enactment of Chapter 1051, a person furnishing rental information to prospective tenants for a fee was required to obtain a real estate license.<sup>3</sup> Chapter 1051 repeals the provision requiring a real estate license for prepaid rental agents and enacts a separate statutory scheme for the regulation of prepaid rental listing services.<sup>4</sup>

### *Licensing*

Ninety days after the passage of Chapter 1051, it will be unlawful for any person to engage in the business of a prepaid rental listing service unless licensed in that capacity or licensed as a real estate broker.<sup>5</sup> A separate application for a license as a prepaid rental listing service must be made in writing for each location<sup>6</sup> to be operated by a licensee<sup>7</sup> who is not a real estate broker.<sup>8</sup> Applications for a license, as well as appli-

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1. *See* CAL. BUS. & PROF. CODE §10167(a).

2. *See id.*

3. *See* CAL. STATS. 1979, c. 959, §1, at — (amending CAL. BUS. & PROF. CODE §10143). *See generally* CAL. BUS. & PROF. CODE §§10130, 10131(b).

4. *Compare* CAL. STATS. 1980, c. 1051, §1, at — with CAL. STATS. 1979, c. 959, §1, at —. *See generally* CAL. BUS. & PROF. CODE §§10167-10167.16.

5. *See* CAL. BUS. & PROF. CODE §10167.2; CAL. STATS. 1980, c. 1051, §4, at —. *See also* CAL. BUS. & PROF. CODE §§10167.1, 10167.2, 10167.3 (exemptions from licensing requirement allowed to newspapers of general circulation and real estate brokers providing a prepaid rental listing service at one of their licensed branch offices).

6. *See* CAL. BUS. & PROF. CODE §10167(c) (definition of location).

7. *See id.* §10167(b) (definition of licensee).

8. *See id.* §10167.3.

cations to add or eliminate locations during the term of a license, must be accompanied by a \$100 application fee for the first location and a \$25 application fee for any additional or subsequently added locations.<sup>9</sup> Although an application is valid only for a period of two years,<sup>10</sup> a licensee may continue operating at all locations specified in a previous license if the application and fee for renewal are filed with the Department of Real Estate before midnight of the last day of the period for which the prior license was issued.<sup>11</sup> Chapter 1051 further requires all applicants for a prepaid rental listing service license who are not residents of California to file an irrevocable consent that stipulates to service of process upon the Secretary of State.<sup>12</sup>

Effective 90 days after the passage of Chapter 1051, a \$2,500 bond must be posted for each location listed in, or added to, an application.<sup>13</sup> The Real Estate Commissioner may require proof of the honesty and truthfulness of any applicant and his or her designated agents for each location.<sup>14</sup> In addition, the Commissioner must require every original applicant to be fingerprinted.<sup>15</sup>

Chapter 1051 also provides that the Commissioner may suspend or revoke the license of a prepaid rental listing service for either of the following reasons: (1) a violation by the licensee, or by an employee or agent, of any provision of the Business and Professions Code dealing with prepaid rental listing services;<sup>16</sup> or (2) a conviction of a licensee, or of an officer, director, or owner of at least 25 percent of the shares of a corporate licensee, for a crime that is substantially related to the qualifications, functions, or duties of a prepaid rental listing service licensee.<sup>17</sup> Furthermore, the willful violation of any of the prepaid rental listing service provisions will be a misdemeanor.<sup>18</sup> These provisions are violated if any licensee, or an employee or agent of the licensee, refers property to a prospective tenant, knowing or having reason to know any of the following: (1) that the property does not exist or is unavailable; (2) that the property has been deceptively described or ad-

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9. *See id.*

10. *See id.* §10167.13.

11. *See id.*

12. *See id.* §10167.6.

13. *See id.* §§10167.7, 10167.8 (the bond requirement does not apply to (1) persons exempt from the payment of federal and state income taxes, (2) an agency of the federal, state, or local government, or (3) a real estate broker conducting a prepaid rental listing service); CAL. STATS. 1980, c. 1051, §4, at —.

14. *See* CAL. BUS. & PROF. CODE §10167.4. *See also id.* §10167.12(a), (b); CAL. GOV'T CODE §§11500-11528 (hearing to determine whether any grounds for an action exist).

15. *See* CAL. BUS. & PROF. CODE §10167.4.

16. *See generally id.* §§10167-10167.15.

17. *See id.* §10167.12(a), (b). *See generally* CAL. GOV'T CODE §§11500-11528.

18. *See* CAL. BUS. & PROF. CODE §10167.15.

vertised; (3) that the licensee has not confirmed, or made a good faith effort to confirm, the availability of the property for tenancy during the four-day period immediately preceding dissemination of the listing information; or (4) that the licensee has not obtained written or oral permission from the property owner or an authorized agent to list the property.<sup>19</sup> Whenever any person engages in, or threatens to engage in, acts which constitute a violation of these provisions, the superior court of the county in which the acts have taken place, or will take place, may enjoin the acts by appropriate order upon a complaint of the Commissioner, Attorney General, district attorney, or city attorney.<sup>20</sup>

### *Conduct of Licensees*

The business licensed at each location must be conducted under the immediate supervision of a licensee or a designated agent<sup>21</sup> who is not a designated agent at any other location.<sup>22</sup> Upon the death or termination of employment of a designated agent, the licensee must give written notice to the Department of Real Estate within five days.<sup>23</sup> The license issued for that particular location will automatically expire 60 days after the designated agent ceases to conduct business unless within a 60-day period the licensee submits to the department written notice of a new designated agent.<sup>24</sup> During the 60-day period, a designated agent of the licensed service who is licensed at another location may also serve as designated agent for the location in question.<sup>25</sup>

Chapter 1051 further states that, prior to the acceptance of a fee from a prospective tenant, a licensee must provide the prospective tenant with a written contract.<sup>26</sup> This contract should at least include the following: (1) the name of the licensee and the addresses and telephone numbers of the licensee and of the location providing the listing to the prospective tenant;<sup>27</sup> (2) acknowledgement of receipt of the fee, including the amount;<sup>28</sup> (3) a description of the service to be performed by the licensee;<sup>29</sup> (4) the prospective tenant's specifications for the rental prop-

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19. *See id.* §10167.11.

20. *See id.* §10167.14. *See generally* CAL. CIV. PROC. CODE §§525-535 (injunctions).

21. *See* CAL. BUS. & PROF. CODE §10167(d) (definition of designated agent).

22. *See id.* §10167.5.

23. *See id.*

24. *See id.*

25. *See id.*

26. *See id.* §10167.9(a). *See also id.* §10167.9(d) (procedure when prospective tenant contacts licensee by telephone from a distance of more than 50 miles).

27. *See id.* §10167.9(a)(1).

28. *See id.* §10167.9(a)(2).

29. *See id.* §10167.9(a)(3).

erty;<sup>30</sup> (5) the contract expiration date, which cannot be later than 90 days from the date of execution of the contract;<sup>31</sup> (6) the signature of the licensee or of the designated agent, real estate salesperson, or employee acting on behalf of the licensee;<sup>32</sup> and (7) a clause setting forth the right to a full refund under specified circumstances.<sup>33</sup> The form of contract proposed to be used by the licensee, as well as any subsequent modifications, must be filed with the Department of Real Estate.<sup>34</sup> The licensee must retain the original copy of each contract for at least six months, during which time the contract is subject to examination by a representative of the Real Estate Commissioner.<sup>35</sup>

### *Right to Refund*

Chapter 1051 provides for a full refund of the advance fee if within five days after execution of the contract the licensee does not supply to the prospective tenant at least three available rental properties meeting the specifications of the contract.<sup>36</sup> If the prospective tenant makes a demand for a refund within ten days following the expiration of the five-day period, the licensee, if other than a real estate broker, must refund to the prospective tenant any amount over \$25.<sup>37</sup> In addition, if the prospective tenant does not obtain a rental through the services of the licensee, the licensee must refund any amount of the fee in excess of \$25 if the prospective tenant makes a demand within ten days of the expiration of the contract.<sup>38</sup> If a licensee denies a refund in bad faith, a court of appropriate jurisdiction or a small claims court may award damages to the prospective tenant.<sup>39</sup> The award may not exceed \$200 in addition to actual damages.<sup>40</sup> If the licensee refuses or is unable to pay the damages awarded by the court, the award may be satisfied out of any bond posted by the licensee.<sup>41</sup>

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30. *See id.* §10167.9(a)(4).

31. *See id.* §10167.9(a)(5).

32. *See id.* §10167.9(a)(7).

33. *See id.* §§10167.9(a)(6), 10167.10(c).

34. *See id.* §10167.9(c).

35. *See id.* §10167.9(b).

36. *See id.* §§10167.10(a)(1), (2) (refund provisions do not apply to a person purchasing rental information for a purpose other than that of locating a rental unit), 10167.10(d) (language specifications for refund provision of real estate broker's contract).

37. *See id.* §10167.10(a)(2), (b).

38. *See id.* §10167.10(c).

39. *See id.* §10167.10(e).

40. *See id.*

41. *See id.* §§10167.7, 10167.10(e).



### COMMENT

In 1965, the legislature brought the advance fee rental business within the scope of statutory regulation concerning real estate brokers.<sup>42</sup> The furnishing of lists of rental vacancies to prospective tenants for compensation was thus an act for which a real estate license was required.<sup>43</sup> This action was deemed necessary to protect owners of property, as well as the general public, from the fraudulent practices of persons and entities engaged in the advance fee rental business.<sup>44</sup>

In *Anderson v. Department of Real Estate*,<sup>45</sup> regulations controlling the issuance of licenses to real estate brokers and real estate salespersons were held to be an unconstitutional infringement on the freedom of commercial speech when applied to advance fee rental agents.<sup>46</sup> The *Anderson* decision appears to indicate that advance fee rental agents can be separately licensed if they are subjected to qualifications rationally related to the reasons for licensure.<sup>47</sup> The focus of the licensing regulations established by Chapter 1051 is consumer protection.<sup>48</sup> Since these regulations govern only the practices of those persons engaged in the publishing and selling of lists of available rental units, and since the regulations appear to be rationally related to the goal of consumer protection, Chapter 1051 would appear to satisfy the constitutional standard set out in *Anderson*.<sup>49</sup>

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42. See CAL. STATS. 1965, c. 172, §5, at 1134 (amending CAL. BUS. & PROF. CODE §10131). See also *Tyrone v. Kelley*, 9 Cal. 3d 1, 9-10, 507 P.2d 65, 70, 106 Cal. Rptr. 761, 766-67 (1973) (real estate broker's license required for advance fee operators).

43. See CAL. STATS. 1965, c. 172, §5, at 1134. See also 9 Cal. 3d at 9-10, 507 P.2d at 70, 106 Cal. Rptr. at 766-67.

44. See CAL. STATS. 1959, c. 2117, §14, at 4942.

45. 93 Cal. App. 3d 696, 155 Cal. Rptr. 307 (1979).

46. See *id.* at 701-05, 155 Cal. Rptr. at 310-12.

47. See *id.* at 702-04, 155 Cal. Rptr. at 311-12.

48. See generally CAL. BUS. & PROF. CODE §§10167-10167.16.

49. See 93 Cal. App. 3d at 704, 155 Cal. Rptr. at 312.

### Business Associations and Professions; dangerous drugs—penalties

Business and Professions Code §§4181, 4227.5, 4235, 4389, 4392 (repealed); §4047.1 (new); §§4008, 4035, 4035.2, 4035.3, 4050, 4211, 4229, 4230, 4234, 4240, 4353, 4362, 4382, 4385, 4386, 4387, 4390.1 (amended).

SB 1738 (Presley); STATS 1980, Ch 649

Support: Department of Consumer Affairs; Department of Finance;  
Office of the Governor, Legal Affairs Unit

Prior to the enactment of Chapter 649, a person who used a minor as an agent to violate the provisions of the Business and Professions Code relating to the distribution and possession of dangerous drugs<sup>1</sup> was guilty of a felony.<sup>2</sup> Also under prior law, when no other penalty was provided for a violation of the regulations governing the practice of pharmacy,<sup>3</sup> the violation was punishable as a misdemeanor.<sup>4</sup> Chapter 649 now provides that the use of a minor as an agent to violate the dangerous drug provisions will constitute a felony only when the violation is *knowingly or willfully* committed.<sup>5</sup> Moreover, when no other penalty exists for a violation of the law applicable to the practice of pharmacy, Chapter 649 requires a *knowing* violation to support a misdemeanor conviction.<sup>6</sup> In this latter situation, any violation that is not knowingly committed will be punished as an infraction.<sup>7</sup> In addition, Chapter 649 makes it a misdemeanor for an unauthorized person to *possess* a prescription blank that bears the name, address, and federal registry or other identifying information of a person authorized by law to dispense, administer, or prescribe a controlled substance.<sup>8</sup>

Under prior law, the compounding, sale, and use of poisons was highly regulated by the Business and Professions Code.<sup>9</sup> In apparent response to *People v. Barben*,<sup>10</sup> which declared that some of these sections were unconstitutionally vague,<sup>11</sup> the legislature repealed many of the provisions regulating poisons in 1979.<sup>12</sup> Chapter 649 completes the task started in 1979 by repealing the remaining nonconforming section<sup>13</sup> and deleting the term poison from other sections of the Business and Professions code.<sup>14</sup> Furthermore, Chapter 649 substitutes the phrase "dangerous drug" for the term "poison" in certain situations.<sup>15</sup>

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1. See generally CAL. BUS. & PROF. CODE §§4210-4242.

2. See CAL. STATS. 1970, c. 1596, §11, at 3334 (amending CAL. BUS. & PROF. CODE §4234).  
But see CAL. STATS. 1970, c. 1599, §11, at 3334 (preparation of specified drugs is not treated as a felony).

3. See generally CAL. BUS. & PROF. CODE §§4000-4416.

4. See CAL. STATS. 1955, c. 550, §3, at 1053 (enacting CAL. BUS. & PROF. CODE §4382).

5. See CAL. BUS. & PROF. CODE §4234.

6. See *id.* §4382(a).

7. See *id.* §4382(b).

8. See *id.* §4390.1.

9. See CAL. STATS. 1955, c. 550, §3, at 1038 (enacting CAL. BUS. & PROF. CODE §§4160-4184).

10. *People v. Barben*, 88 Cal. App. 3d 215, 151 Cal. Rptr. 717 (1979).

11. See *id.* at 218, 151 Cal. Rptr. at 719.

12. See CAL. STATS. 1979, c. 437, §§15-34, at —.

13. See CAL. STATS. 1980, c. 649, §7, at —.

14. Compare CAL. BUS. & PROF. CODE §§4008, 4035, 4050, 4385-4387 with CAL. STATS. 1979, c. 446, §1, at — and CAL. STATS. 1970, c. 1594, §1, at 3328 and CAL. STATS. 1965, c. 1822, §§56, 57, 58, at 4210-11 and CAL. STATS. 1955, c. 550, §3, at 1031.

15. Compare CAL. BUS. & PROF. CODE §§4050, 4385-4387 with CAL. STATS. 1965, c. 1822, §§56, 57, 58, at 4210-11 and CAL. STATS. 1955, c. 550, §3, at 1031.

Prior law defined a dangerous drug as any drug unsafe for self-medication, including several enumerated drugs and compounds.<sup>16</sup> Under Chapter 649, a dangerous drug is still defined as any drug unsafe for self-medication; the reference to specified drugs, however, has been deleted.<sup>17</sup> Instead, Chapter 649 includes as a dangerous drug any drug or device that is labeled so as to indicate that federal law prohibits the dispensing of the drug without prescription,<sup>18</sup> and any drug that by state or federal law can lawfully be dispensed only on prescription or issued pursuant to the Business and Professions Code.<sup>19</sup>

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16. See CAL. STATS. 1977, c. 479, §2, at 1553 (amending CAL. BUS. & PROF. CODE §4211).

17. Compare CAL. BUS. & PROF. CODE §4211 with CAL. STATS. 1977, c. 478, §2, at 1553.

18. See CAL. BUS. & PROF. CODE §4211(a), (b).

19. See *id.* §4211(c).